Supreme Court, U.S.
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No. 99 - 10

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL K. LEGGETT,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER A CRIMINAL DEFENDANT'S RIGHT TO TESTIFY IS PERSONAL, NOT SUBJECT TO WAIVER BY COUNSEL ALONE.

2. WHERE IT APPEARS THE DEFENDANT WILL NOT TESTIFY, SHOULD TRIAL COURTS SHOULD BE REQUIRED TO ADVISE THE DEFENDANT OF HIS RIGHT TO TESTIFY AND TO OBTAIN AN ON-THE-RECORD OF THIS RIGHT; BUT IF NOT, WHETHER THE PRESENT TRIAL COURT HAD SUFFICIENT NOTICE OF PETITIONER'S DESIRE TO TESTIFY OVER COUNSEL'S OBJECTION, REQUIRING AN ON-THE-RECORD ADVISEMENT AND WAIVER.

3. WHETHER A CRIMINAL DEFENDANT'S RIGHT TO COUNSEL MAY BE FORFEITED BY HIS DISRUPTIVE CONDUCT.

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The opinion of the Court of Appeals for the Third Circuit is reported at 162 F.3d 237 (3d Cir. 1998).

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Seventh Circuit was rendered on December 3, 1998. (App. 1). A petition for rehearing with suggestion for rehearing en banc was timely filed, and denied by order dated February 25, 1999. (App. 35-36). An application for an extension of time within which to file a petition for a writ of certiorari was timely filed, and was granted by this Court's order dated April 24, 1999, extending the filing date to June 25, 1999. (App. 37). This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment of the United States Constitution provides:

> No person shall be deprived of life, liberty or

property without due process of law.

STATEMENT OF THE CASE

Petitioner, Michael K. Leggett, was tried and convicted of violating 18 U.S.C. § 111, assaulting a prison guard official. (App. 2). In a two-to-one split, the Court of Appeals below affirmed the conviction and sentence. (App. 24).

A. **Trial**

Petitioner was a prison inmate, charged with assaulting a prison guard. Insanity was the principal defense raised at trial. During the trial, a fundamental dispute arose between petitioner and his counsel, and this disagreement was squarely brought to the district court's attention. Specifically, petitioner wanted to exercise his constitutional right to testify over his counsel's objection.

> [**DEFENSE COUNSEL**]: I'm not resting at this point, but I intend to rest. Now, Mr. Leggett has indicated to me that he wants to testify. . . . I have advised him against testifying. . . . I don't think it's in his best interest. . . . He does not want to take that advice, apparently, and he's -- at least up until now. I don't know whether he's changed his mind to insist on testifying.
>
> [**COURT**]: Why don't you talk to him over the lunch hour. And if he wants to take the stand, what is your view as to whether -- I mean, aside from the right of it, do you think he has the right to take the stand.?

[DEFENSE COUNSEL]: I think he does, Your honor.

[COURT]: All right. Well, what are you asking us to do, if anything?

[DEFENSE COUNSEL]: Well, you Honor, if he takes — if he insists on taking the stand, I'm not sure what my role is at that point other than asking him his name, because I don't — I think it's self-defeating for this man to testify.

* * *

Now, as far as what — what my obligation is — I think that the Court ought to advise Mr. Leggett that, you know, your lawyer has told you that it's not in your best interests to testify. However, you do have a right. . . . [I]f he says, yes, I wish to take the witness stand, I don't have any questions prepared to ask him, other than what's your name and what do you have to say to the jury on your behalf.

* * *

[COURT] [addressing the prosecutor]: Well, what is wrong with Mr. Gardner asking his witness — asking his client, if the client insists on taking — I don't know whether Judge McClure is waiting out there or not. . . . We are late . . . . I throw this out for consideration. Mr. Gardner might properly ask him, well, what happened with respect to . . . whatever the gentleman's name was. What happened at that

incident. Do you think there's something wrong with that?

[**PROSECUTOR**]: At a minimum I think that should be asked. Judge.

[**DEFENSE COUNSEL**]: . . . . I don't know what Mr. Leggett's going to say. I'm at a loss. I never put a witness on the stand like Mr. Leggett before. And nothing that I've said or discussed with him over the past months has given me any indication or what he's going to say when he gets on the witness stand, other than ideation and these hallucinations and delusion.

[**COURT**]: Of course, that may be very helpful to you.

[**DEFENSE COUNSEL**]: Again, like I say, I don't know what the man's going to say.

[**COURT**]: I'm perfectly willing to tell Mr. Leggett what I told him before, that you ought to listen to your lawyer's advise,[sic] . . . If I were on trial, I would follow my lawyer's advice, even though I thought it was wrong. And I do think that you should give that the greatest consideration.

What more do you think I ought to tell him, if anything?

[**DEFENSE COUNSEL**]: That his criminal record may come out if he takes the stand.

* * *

[**COURT**]: Well, he knows that. . . . What else?

[**DEFENSE COUNSEL**]: That he may — well, in my opinion, he's going to — it's going to be self-defeating, and he's going to destroy any possibility of an acquittal in this case.

[**COURT**]: Well, I think there's question about that. He may be so far off base that it might win this case for him. So I don't know what more you want me to say.

[**DEFENSE COUNSEL**]: That's [sic] suffices. Your Honor.

(App. 26-28).

When petitioner spoke directly to the district court, he did his best to emphasize his disagreement with counsel's decision not to put him on the stand:

[**DEFENDANT**]: I can't talk?

[**THE COURT**]: What did you want to say?

[**DEFENDANT**]: I wanted to say this here. This lawyer ain't been talking to me. If he would have been talking to me, he would know what I was going to say on the witness stand. That shows that this man is giving me ineffective assistance. He talking about he don't know what I'm going to say on the stand.

* * *

> [**COURT**]: Just a minute. The law clerks and I have discussed Mr. Gardner's performance in this case, and we think it is remarkably good, and — so don't tell me that he's giving you ineffective assistance. He's going (sic) an excellent job.
>
> [**DEFENDANT**]: Well, what I'm --
>
> [**COURT**]: Just a second. I have got (sic) appointment with another judge. You know it. I am seven minutes late. I am going to keep it, and this Court's in recess.

(App. 28-29).

The district court did not take up this question until just prior to the close of the case At that time, the district court called counsels to sidebar, inquiring if the defense had any further evidence to offer. The court purposefully called counsels to sidebar so that petitioner could not interject his desire to take the stand:

> [**PROSECUTION**]: The prosecution has no other rebuttal witness, Your Honor. We would move into evidence certain of the documents that Court has previously seen today, but we can do that out of the presence of the jury.
>
> [**COURT**]: Okay. All right. May I see counsel, please.
>
> (at sidebar)

> I didn't want to do this in open Court, but do you have — I'm not sure of your being entitled to any further evidence, but I wondered whether you had any.
>
> **[DEFENSE COUNSEL]**: I haven't any.
>
> **[COURT]**: All right. *That's fine. I didn't want to say it because I thought he might jump up and say he wanted to testify.*

(App. 29.)

In spite of this colloquy, the panel below decided that petitioner had not done enough "to compel a district court to investigate whether the defendant's [right to testify was] being impinged." App. 17.

The dissent took sharp issue with the majority's characterization of the above events:

> The majority hold that this scenario does not fall within the 'exceptional, narrowly defined circumstances' that require 'a direct colloquy with a defendant. . . . to ensure that the defendant's right to testify is protected.' (Citation omitted). If it doesn't, then I am hard pressed to imagine a scenario that would.
>
> * * *
>
> My colleagues conclude that this is not such an occasion [for judicial involvement to protect the defendant's right to testify] by characterizing the events that transpired during the trial as a

'[m]ere disagreement between defendant and counsel with regard to strategic decisions.' They conclude that the 'disagreement' 'does not create a situation severe enough to compel a district court to investigate whether the defendant's rights are being impinged.' Maj. Op. at 17. However, 'every circuit that has considered this question has placed the defendant's right to testify in the ''personal rights'' category — i.e., waivable only by the defendant himself regardless of tactical considerations.' (Citation omitted).

Furthermore, even assuming this was a 'mere disagreement' over strategy, it was still a violation of the holding in *Pennycooke, [v. United States*, 65 F.3d 9 (3d Cir. 1995)] to only ask defense counsel if his client wanted to testify, and make absolute ly inquiry of the defendant. . . . Not only did the trial court address its inquiry only to counsel, it did so in a manner that prevented the defendant from responding, or objecting to his attorney's response. In fact, the defendant did not even know that the trial court had asked the question of his attorney. It is true that Leggett did not request to testify following the sidebar when his attorney informed the court that he had no additional evidence to present. It is also irrelevant. How could he make such a request? Leggett could not very well have disrupted the proceedings by standing in open court and speaking directly to the judge without being asked anything. That was the choice that the judge's sidebar left him. This jury was about to

> determine his fate. Surely, Leggett's failure to jump to his feet in front of the jury and insist that he be allowed to speak can not equate with a waiver of the right he asserted just the precedent day. Ironically, Leggett may have done exactly that (jump to his feet and assert his right to testify as the judge feared) had he known what was going on. The judge realized that. He called defense counsel to sidebar to prevent it. . . .

(App. 29, 30-31).

B. **Sentencing**

During the sentencing hearing, petitioner assaulted counsel in full view of the district court. Under circuit precedent, the panel held that, by this act, "Leggett forfeited his right to counsel at the sentencing hearing." (App. 24).

REASONS FOR GRANTING THE WRIT

1. A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO TESTIFY IS PERSONAL AND IS NOT SUBJECT TO WAIVER BY COUNSEL ALONE

The federal and state courts are nearly unanimous in holding that a criminal defendant's right to testify is personal, waivable only with his or her consent. This Court, however, has not decided the question.

A. Due Process Right

In *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court held that a criminal defendant has a constitutional right to testify. This right, the Court decided, emanated principally from the due process clause of the Fourteenth Amendment[1], but that the compulsory process clause of the Sixth Amendment[2], the Sixth Amendment right to counsel[3] and the Fifth Amendment privilege against self-incrimination[4] were also implicated. The High Court, however, has not decided whether this same right is personal, i.e., "'waivable only by the defendant himself regardless of tactical considerations.' (Citations omitted)." *Brown v. Artuz*, 126 F.3d 73, 77 (2nd Cir. 1997); *Id.* at 78 ("*Rock* itself did not settle this issue"); *United States v. Teague*, 953 F.2d 1525, 1531 (11th Cir. 1992)("the Supreme Court has not expressly addressed this question"); *State v. Newman*, 371 S.E.2d 77, 81 (W. Va. 1988)("the United States Supreme Court has not been squarely faced with this issue").

Yet, virtually all federal and state courts have, holding that the defendant's right to testify is personal. *Brown v. Artuz*, 126 F.3d at 77 (cites federal authorities); Timothy P. O'Neill, *Vindicating the Defendant's Constitutional Right to Testify at Trial*, 51 Univ.Pitt.L.R. 809, 824 n.116 (1990)(cites state cases); *but see Young v. Ricketts*, 250 S.E.2d 404, 405-06 (Ga. 1978). In so doing, many courts interpret this Court's language

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[1] *Id.* at 51

[2] *Id.* at 52.

[3] *Id.* at 52.

[4] *Id.* at 52-53.

in *Rock v. Arkansas*, 483 U.S. at 51, *Jones v. Barnes*, 463 U.S. 745, 751 (1983), *Harris v. New York*, 401 U.S. 222, 225 (1971) and *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) as support for this proposition. *E.g., Brown*, 124 F.3d at 77-78; *Teague*, 953 F.2d at 1531; *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987); *United States v. Pennycooke*, 65 F.3d 9, 10-11 (3rd Cir. 1995).

On the other hand, characterizing a defendant's right to testify as personal, creates a form of hybrid representation. *See McKaskle et al. v. Wiggins*, 465 U.S. 168, 183 (1983)(no Sixth Amendment right to hybrid representation); *cf. Faretta v. California*, 422 U.S. 806, 820 (1974)("It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas."). In this regard, the Second Circuit has identified arguments in favor of treating the right to testify as waivable by counsel alone:

> It may be argued, for instance, that once a defendant waives his right to self-representation and retains counsel to represent him during trial, he thereby forfeits his right to determine all tactical aspects of the conduct of trial, including whether certain objections will be made, how a cross-examination of a prosecution witness will be conducted, and which witnesses, including the defendant himself, will testify for the defense. Because the decision whether the defendant will testify requires weighing the potential benefits against numerous dangers, it might well be left to defense counsel, like other strategic decisions. Defense counsel has superior experience with the criminal process

> and detailed, objective knowledge of the strengths and weakness in the defendant's case.

Brown, 124 F.3d at 77.

So far this Court has ruled that the following are examples of personal rights: the decision to enter a plea[5], the decision to waive a jury trial[6], the decision to pursue an appeal[7], and the decision to waive representation.[8]

B. Historical Basis

Well before the decision in *Rock v. Arkansas*, the common law permitted -- indeed encouraged -- criminal defendants to make unsworn statements to the judge and jury. *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 Yale.L.J. 575, 603-04 (1997); John H. Langbein, *The Privilege Against Self-Incrimination*, The Privilege and Common Law Practice, (University of Chicago Press 1997) at 82-84; *see also Wright v. Estelle*, 572 F.2d 1071, 1078 (5th Cir. 1978)(Godbold J., dissenting)(cites historical figures speaking out on their behalf at court proceeding); *see Faretta*, 422 U.S. at 823-24. This practice arose out of necessity as criminal defendants were required to represent themselves. Langbein, *The Privilege Against Self-Incrimination* at 83-88. Without the right to counsel and other procedural rights, the accused could only answer the government's charges and evidence by allowing him

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[5] *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969).

[6] *Adams v. United States*, 317 U.S. 269, 275 (1942).

[7] *Fay v. Noia*, 372 U.S. 391, 438-40 (1963).

[8] *Faretta v. California*, 422 U.S. 806.

to "'speak for himself'." *Id.* at 88. In short, an accused's right to "speak for himself" was, for all practical purposes, the entirety of his defense. *Id.* at 83-88.

"With the Treason Act of 1695, there began a long and important era of reform in English criminal procedure." *Faretta*, 422 U.S. at 824. Most important among these changes was the introduction of defense counsel. *Id.* at 824-26. "The first lawyers were personal friends of the litigant, brought into court by him so that he might ''take 'counsel' with them' before pleading. (Citation omitted). Similarly, the first ''attorneys'' were personal agents, often lacking any professional training, who were appointed by those litigants who had secured royal permission to carry on their affairs through a representative, rather than personally. (Citation omitted)." *Id.* at 821 n.16. With the increasing prominence of counsel in criminal cases, the defendant's role became less active and substantially less visible. *The Privilege Against Self-Incrimination* at 96-97. As such, counsel assumed greater power and responsibility over the strategies of the defense.

Now, the vast majority of the trial decisions are exclusively for counsel to make. "The decision, for example, whether or not to cross-examine a specific witness is . . . very clearly one for counsel alone." *Brookhart v. Janis*, 384 U.S. 1, 8 (1966)(Harland J., concurring). But, in spite of this marked shift of control over the litigation, the "defense" itself and those rights and decisions basic to it have always belonged to the defendant. *Faretta*, 422 U.S. at 829-30 ("The right to counsel was clearly thought to supplement the primary right of the accused to defend himself..."); *see Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1 (1977)(Burger J., concurring)("Only such basic decisions as to whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make.").

Viewed in this way, a defendant's decision to testify is not only a question of trial strategy, although it is certainly that. It is, in many ways, the essence of the defense itself. *Rock*, 483 U.S. at 52 (right to testify is "[e]ven more fundamental to a personal defense than the right of self-representation"); *cf. Brooks v. Tennessee*, 406 U.S. 605, 612 (1972)("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."). Indeed, a jury so expects a criminal defendant to testify on his own behalf that if he declines to do so the jury, upon request, must be told not to draw a negative inference from his silence. *Carter v. Kentucky*, 450 U.S. 288, 301 n.18 (1981). Significantly, in *Brooks*, 406 U.S. at 612-13, this Court spoke of the defendant's right to testify as a fundamental right, one that should be exercised by joint decision of defendant and counsel.

Thus, the present question boils down to whether counsel has the power to override his client's decision to testify.

2. WHENEVER IT APPEARS THAT A CRIMINAL DEFENDANT WILL NOT TESTIFY, TRIAL COURTS SHOULD BE REQUIRED IN ALL CASES TO ADVISE THE DEFENDANT OF HIS RIGHT TO TESTIFY AND TO OBTAIN AN ON-THE-RECORD WAIVER OF THIS RIGHT; BUT, EVEN IF THE COURT DOES NOT IMPOSE THIS GENERAL REQUIREMENT, THE TRIAL COURT IN THIS CASE WAS PUT ON SUFFICIENT NOTICE OF PETITIONER'S DESIRE TO TESTIFY OVER COUNSEL'S OBJECTION, REQUIRING AN ON-THE-RECORD ADVISEMENT AND WAIVER.

Assuming the defendant's right to testify is personal, this Court must consider the procedures required of trial judges to protect this right. In this regard, federal and state appellate courts have fashioned two basic approaches.

A. **Active Judicial Involvement**

Several recent states court decisions require or strongly encourage trial judges to advise a criminal defendant on-the-record of his right to testify and to obtain an express waiver of this right, whenever it appears he will not testify. *People v. Curtis*, 681 P.2d 504, 514-15 (Colo. 1984); *Culberson v. State*, 412 So.2d 1184, 1186 (Miss. 1982)("We suggest to the trial judges of the state that, in any case where a defendant does not testify, before the case is submitted to the jury, the defendant should be called before the court out of the presence of the jury, and advised of his right to testify."); *Tachibana v. State*, 900 P.2d 1293, 1303 (Haw. 1995)("we hold that in order to protect the right to testify. . . trial courts must advise criminal

defendants of their right to testify and must obtain an on-the-record waiver of that right in every case in which the defendant does not testify"); *see also LaVigne v. State*, 788 P.2d 52, 55 (Alaska 1990)(express waiver of right to testify must be obtained); *Gill v. State*, 632 So.2d 660, 661 n. 1 (Fla. 1994)(court colloquy of the right to testify encouraged); *Sanchez v. State*, 841 P.2d 85, 89 (Wyo. 1992)(trial judges must obtain on-the-record waiver of right to testify).

These cases point out that similar on-the-record prophylactic procedures apply to waivers of other personal rights. *E.g., Boykin v. Alabama*, 395 U.S. 238 (guilty pleas). This approach has much to recommend it: namely, a categorical advisement rule ensures the protection of a fundamental right and also removes any potential post-conviction litigation on this issue. *See Tachibana*, 900 P.2d at 1300-02.

B. Limited Judicial Involvement

Most courts however, including the Court of Appeals below, require an on-the-record advisement and waiver of the right only in exceptional cases. This duty arises when the trial court has actual or constructive knowledge that the defendant wishes to testify over his counsel's objection. (App. 17).

But, in all other cases, "[a]s long as it is clear that defense counsel has informed the defendant of the right to testify and the defendant understands that right, a district court has no reason to intervene. (Citation omitted)." (App. 17). This approach is often been referred to as the demand rule: a defendant's knowing and voluntary waiver of his right to testify is presumed from his failure to testify, unless he expressly demands to testify over his counsel's objections. *See Tachibana v. State*, 900 P.2d at 1300-01.

Even if this Court were to adopt the more limited demand rule, the facts of this case demonstrate that the trial court breached its duty to advise petitioner of his right to testify. As the dissent explains:

> The majority hold that this scenario does not fall within the 'exceptional, narrowly defined circumstances' that require 'a direct colloquy with a defendant. . . . to ensure that the defendant's right to testify is protected.' (Citation omitted). If it doesn't, then I am hard pressed to imagine a scenario that would.

(App. 29).

3. A CRIMINAL DEFENDANT'S RIGHT TO COUNSEL CAN ONLY BE WAIVED BY THE DEFENDANT'S KNOWING, INTELLIGENT AND VOLUNTARY WAIVER; THE THIRD AND ELEVENTH CIRCUITS' NEWLY CREATED FORFEITURE DOCTRINE TO TAKE AWAY THIS RIGHT VIOLATES THE SEMINAL PRINCIPLES OF *JOHNSON v. ZERBST*

The Third and Eleventh Circuits's forfeiture rule of the right to counsel seriously undermines this Court's firmly establish authority.

In *Johnson v. Zerbst*, 304 U.S. 458, 465 (1937), this Court held that a criminal defendant can only lose his Sixth

Amendment right to counsel[9] by knowingly, intelligently and voluntarily waiving this right before the trial court. This rigorous standard for an express waiver derives from the importance of defense counsel's role in the criminal justice system:

> [P]recedent [and] reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.

Gideon v. Wainwright, 372 U.S. 337, 344 (1963). The same requirements for waiver have been applied to other constitutional rights. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970)("courts must indulge every reasonable presumption against the loss of constitutional rights").

But many, if not most, rights can be lost without invoking the procedural protections of *Johnson v. Zerbst*. These rights may be "forfeited", as it were, by the defendant's or counsel's conduct, most commonly by the failure to timely assert them. *United States v. Olano*, 507 U.S. 725, 733 (1993)("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' *Johnson v. Zerbst*, 304 U.S. 458, 464. . ."); *United States v. Goldberg*, 67 F.3d 1092, 1100 (3rd Cir. 1995)("Unlike waiver, which requires a knowing and intentional

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[9]The right to counsel applies to all critical phases of a criminal proceeding affecting substantial rights, including sentencing. *Rhay v. Washington State Board of Prison Terms and Paroles*, 382 U.S. 336 (1967).

relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right.").

Illinois v. Allen, 397 U.S. 337 created a narrow exception to the express waiver requirement of *Johnson v. Zerbst*. In *Allen*, the Court effectively held that, in certain circumstances, the Sixth Amendment right to be present at trial can be forfeited by a defendant's uncontrollable misconduct[10]:

> [W]e explicitly hold that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

Id. at 343.

At bottom, *Allen* has a functional, not punitive, purpose. That purpose is to prevent a criminal defendant's misbehavior from frustrating the proper administration of criminal justice. *See Faretta v. California*, 422 U.S. at 834 n. 46.

But *Allen* does not suggest a larger principle of forfeiture. Its holding is limited to its context and explicit purpose. Nevertheless, the Eleventh Circuit in *United States v.*

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[10]The Third Circuit has characterized a criminal defendant's loss of a constitutional right by his misconduct as "wavier by misconduct." *United States v. Goldberg*, 67 F.3d at 1100-01.

McLeod, 53 F.3d 322, 325 (11th Cir. 1995) read *Allen* and federal circuit cases as authority to extend the forfeiture doctrine to the right to counsel:

> Courts thus have recognized that a criminal defendant may forfeit constitutional rights by virtue of his or her actions. The Sixth Amendment right to counsel, for example, may be forfeited by a defendant's failure to retain counsel within a reasonable time, even if this forfeiture causes the defendant to proceed *pro se*. *See [United States v.] Fowler*, 605 F.2d at 183. Additionally, a defendant who misbehaves in the courtroom may forfeit his constitutional right to be present at trial. *See, e.g., Illinois v. Allen*, 397 U.S. 337; *Foster v. Wainwright*, 686 F.2d 1382, 1388-89 (11th Cir. 1982). A defendant who causes a witness to be unavailable for trial forfeits his right to confrontation. *See United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. Unit B 1982). A defendant who escapes from custody during his trial waives his Sixth Amendment rights to be present and to confront witnesses during the trial. *See Golden v. Newsome*, 755 F.2d 1478, 1481 (11th Cir. 1985).
>
> By analogy, we conclude that under certain circumstances, a defendant who is abusive toward his attorney may forfeit his right to counsel.

In *United States v. Goldberg*, 67 F.3d at 1102, as in the present case, the Third Circuit followed the *McLeod* holding. *Goldberg* observed that, under certain circumstances, a criminal

defendant may forfeit his right to counsel by his misconduct. *Id.* at 1102. In this case, the panel below held that petitioner had forfeited his right to counsel by his unprovoked physical battery of his counsel. (App. 24).

The Eleventh and Third Circuits' forfeiture analysis is misguided. In this case, for example, petitioner's misbehavior was extreme, but the sanctions for it are clearly outlined in the *Allen* opinion; i.e, warnings, physical restraints or removal from the proceedings. Petitioner here should have "been warned by the judge that he [would] be removed if he continue[d] his disruptive behavior. . ." *Allen*, 397 U.S. at 343. Or, at most, petitioner should have been restrained or removed from the courtroom to avoid any further risk of disruption or physical harm to others. But, under no circumstances, does a criminal defendant forfeit his right to representation by unruly behavior.

To create a forfeiture rule of this breadth is simply punitive. It cannot be said that, by taking away the right to counsel, a criminal defendant will be any less disruptive or dangerous during the criminal proceedings -- the very concerns of *Allen*. If anything, without the assistance of counsel, an unruly pro se defendant is likely to be more disruptive.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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